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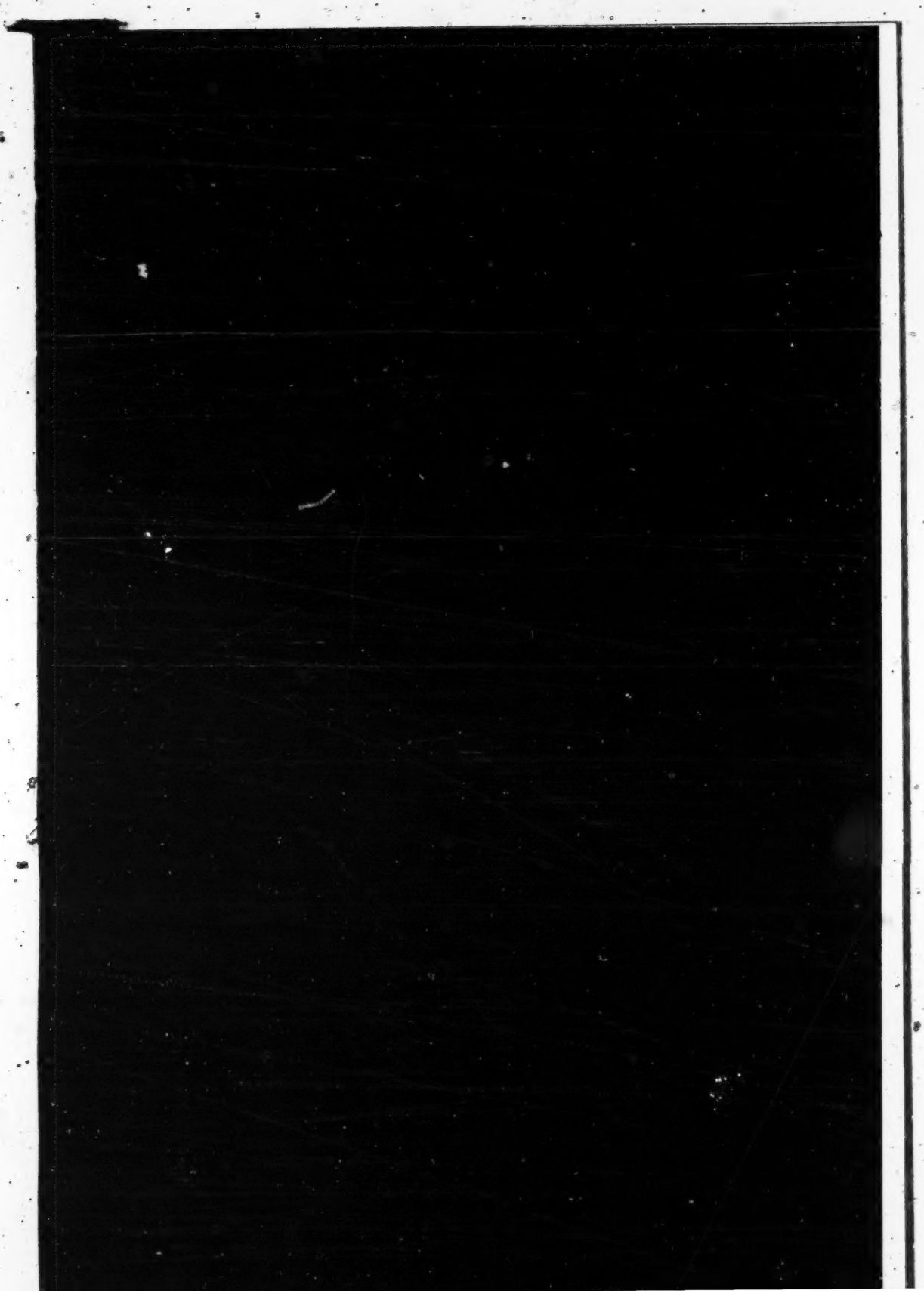

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK,
Petitioner and Appellant,

vs.

THE OWENS-ILLINOIS GLASS COMPANY,
Respondent and Appellee.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

Introduction.

The petition and brief of the petitioner are so confusing and so careless and haphazard in their statement of the questions involved and the citation of authorities alleged to support the position of petitioner that we deem it necessary to restate many of these matters and to give a clear background of the history of this case and the issues involved.

Statement of Case.

Petitioner alleges that she was employed at a plant of the respondent, an Ohio corporation, in the City of Newark in the State of Ohio, and that while so employed, she contracted certain occupational diseases grouped for purposes of brevity under the general heading of pneumoconiosis, and more commonly known as silicosis. Petitioner alleged in her amended petition that she contracted these diseases while in the employ of respondent as a result of respondent's negligence. Under the Ohio law then in force, petitioner had no right of action; for the Ohio statutes and Constitution, as construed by the Ohio Supreme Court, barred all recovery for such occupational diseases.

Petitioner brought suit on her alleged cause of action in 1937 in the Federal Court for the Northern District of Ohio, Western Division. As will become abundantly clear, petitioner brought suit in the Federal District Court for the obvious purpose and solely in order to avoid the application of the Ohio law to her cause of action which arose, if at all, in the State of Ohio. Petitioner was represented in the District Court and throughout these proceedings by counsel who for a number of years have brought similar suits in the Ohio courts, and even up to this Court, to recover for damages growing out of the same and similar occupational diseases. Counsel for petitioner, and apparently petitioner as well, knew when they filed suit in the District Court in 1937 that they had no cause of action under the law of Ohio as expressed in the Constitution and statutes and decisions of the highest court of that State. Counsel for petitioner had been repeatedly rebuffed by the State courts of Ohio in bringing similar suits. After these repeated efforts and great perseverance (which it must be admitted is admirable), counsel for petitioner as a last resort tried their hand with this suit in the Federal court. They hoped that the Federal court would refuse to follow

the law of Ohio as laid down in the Constitution, by the legislature and by the highest tribunal of the State of Ohio. Relying no doubt on the now rejected theory and rule of the case of *Swift* v. *Tyson,* 16 Pet. 1, they hoped and believed that the Federal court would apply to the cause of action stated by them in their amended petition in the instant case some principles of a general Federal common law hovering like a "brooding omnipresence" somewhere in the empyrean.

In seeking to avoid the application of the Ohio law by bringing suit in the Federal court, counsel undoubtedly overlooked the very significant fact that *Swift* v. *Tyson* never had any application to the facts of the instant case; for the Ohio law which denied petitioner a right of action at the time that she filed suit was to be found, not in common law decisions of the highest court of this State, but in the Constitution of Ohio, in the Workmen's Compensation Act and in decisions of the Supreme Court of Ohio construing the relevant provisions of the Constitution and Workmen's Compensation Act. In other words, the law of Ohio, as it then existed, had been determined by the Supreme Court of the State of Ohio, not as a question of common law, but as a question of constitutional and statutory construction. Therefore, the rule of *Swift* v. *Tyson,* even before it was rejected by this Court, had no application to the facts of this case.

While the suit was pending in the District Court, this Court, in the spring of 1938, in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, overruled the century-old doctrine of *Swift* v. *Tyson.* Even, therefore, if the facts of the instant case were within the rule of *Swift* v. *Tyson* (which we have pointed out above was not so), it then became clear that the District Court was bound, under the pronouncement of this Court in *Erie Railroad Co.* v. *Tompkins,* to follow the Ohio law as it then existed and had been announced by the

Supreme Court of Ohio. Both under the *Erie Railroad* case and under the exception to *Swift* v. *Tyson,* which required the Federal District Courts to follow the State law when the decision of the highest tribunal of the State was based upon a construction of State statutory or constitutional provisions or involved local rules of property, the District Court was bound to hold that the petitioner was entitled to no relief against the respondent. Consequently, the District Court did in the late summer of 1938 so hold and rendered judgment for the respondent and dismissed the petition of the petitioner.

An appeal was thereupon taken to the Circuit Court of Appeals for the Sixth Circuit. Ten errors were specified, to only two of which at this time we call the Court's attention, namely, 8 and 9, because they indicate what can only be designated the unadulterated impertinence or, in common parlance, "pure crust" of petitioner. The eighth specification of error (R. 18) is that the Federal District Court erred

> "by failing to hold that the federal courts may follow the common law and that they are not bound by the state courts or state rules in cases where the jurisdiction of the federal court rests upon a diversity of citizenship, as in this case."

The ninth specification of error (R. 18) is

> "that the right to a general federal common law is a derivative right of the federal court system and is not a power reserved to the states by the Tenth Amendment."

This Court will observe that these specifications of error with the eight others, which are equally unsubstantial, were filed after this Court had decided the case of *Erie Railroad Co.* v. *Tompkins.* We, therefore, say that nothing but "pure crust" could move the petitioner to ask the Circuit Court of Appeals to hold that the District Court had erred when the District Court had followed the mandate of this Court

in the *Erie Railroad* case and Section 34 of the Judiciary Act.

The appeal had been docketed in the Circuit Court of Appeals and was pending for some four or five months when the Supreme Court of Ohio completely overruled and reversed itself, and in the case of *Triff* v. *National Bronze & Aluminum Foundry Co.*, 135 O. S. 191, by a divided court of 4 to 3 swept away what had been clearly understood, announced and decided as the law of this State for a quarter of a century. Petitioner then filed in the Circuit Court of Appeals what she designated a reply brief, in which she completely ignored her eighth and ninth specifications of error and asked the Circuit Court of Appeals to apply the law of Ohio as announced in the case of *Triff* v. *National Bronze & Aluminum Foundry Co.* Petitioner thus reversed herself even as did the Ohio Supreme Court in the *Triff* case! The Circuit Court of Appeals, of course, held that the *Triff* case, which was decided some four or five months after the pendency of the appeal, was not applicable to the instant case and that since the District Court had correctly applied the Ohio law as it then existed, there was no error. R. 25, 110 F. (2d) 310.

The case is now before this Court on petition for writ of certiorari. It is significant that although petitioner has specified eleven errors, which is one more than were specified in the courts below, the eighth and ninth specifications of error, which were assigned in the courts below, are not to be found among the eleven specifications of error in this Court. On the contrary, instead of the eighth and ninth specifications of error in the courts below, the ninth specification of error in this Court (petitioner's brief in support of petition for certiorari, page 4) is that the Circuit Court of Appeals erred

> "by failing to hold that the federal district court must follow the common law as laid down by the highest tribunal of its state. * * *"

In other words, petitioner has not only sought to ignore the position taken by her on the appeal in the Circuit Court of Appeals, but she has actually taken a stand directly antithetical to that taken on the appeal in the Circuit Court of Appeals.

In this connection, it is important for the Court to observe that the ninth specification of error (petitioner's brief for writ of certiorari, p. 4) does not even approximate the complaint of petitioner about the judgment rendered by the Circuit Court of Appeals. Petitioner's objection to the judgment of the court below is not that it failed to hold that the Federal District Court must follow the common law as laid down by the highest tribunal in its State. Petitioner's complaint is that the Circuit Court of Appeals, in affirming the judgment, held that the District Court *was* bound to follow the law of Ohio as announced by its highest tribunal and that there was no error because of the District Court's failure to do otherwise.

Moreover, the court below did not fail to hold that the District Court must follow the *common law of the State.* The common law of Ohio was not involved. The law of Ohio, as it existed at the time the District Court rendered judgment, was the law announced by the Supreme Court of Ohio in construing the Ohio Constitution and the Workmen's Compensation Act. That the District Court did follow the law of Ohio as announced by its highest tribunal has been conceded by counsel and is abundantly clear from matters both in and dehors the record. Thus, in the opinion of the court (R. 25, p. 3), 110 F. (2d), at page 312, the court says:

> "* * * it is *conceded* that when the court below dismissed the plaintiff's petition it correctly applied the state law under the mandate of Section 34 of the Judiciary Act, 28 U. S. C. A. Sec. 725, as its rule of decision. * * *" (Italics ours.)

This statement in the opinion of the court was based upon a statement made by counsel for petitioner on page 4 of their brief in the Circuit Court of Appeals, where they said:

> "At the outset, counsel for plaintiff-appellant admit that at the time of this writing the decisions by the Ohio state courts are contrary to the contention of this plaintiff-appellant in this cause. * * *"

Question Presented.

Both the question presented and analogous issues which are not presented by the petition for certiorari are precisely stated by the Court of Appeals in its opinion (R. 25, p. 3) *110 F. (2d) 312.* As stated by the Court of Appeals, the question is

> "whether a judgment of a Federal Court, in a diversity of citizenship case, right when entered, must be set aside because of a new pronouncement by the court of last resort of the state in the construction of a state statute, * * *"

The question presented is not and must not be confused with the analogous issue

> "calling for the application of the rule governing decision of a case involving state law at the time it first reaches a Federal reviewing court, or the rule governing decision of cases involving federal law by reviewing courts thus unfettered by Section 34 of the Judiciary Act. * * *" (P. 313.)

The question presented has been so frequently decided by this Court that it should not be deemed an open question. The Circuit Court of Appeals in its opinion and judgment simply followed and applied the decisions of this Court. We see no reason, and none has been advanced in the petition for certiorari or brief in support thereof, why this Court

should grant the petition for certiorari and consider the question which has long since been laid to rest.

Law and Argument.

1. The Ohio Law.

Article II, Section 35 of the Constitution of Ohio authorizes the passing of laws establishing a State fund out of which to pay compensation for death, injuries or occupational disease, and then provides:

> "* * * Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. * * *"

The Workmen's Compensation Act of Ohio, *General Code, Sec. 1465-70,* provides:

> "Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employe, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation direct to his injured or the dependents of his killed employes as herein provided."

In construing these two provisions, the Supreme Court of Ohio held in the cases of *Zajachuck* v. *Willard Storage Battery Co.,* 106 O. S. 538 (1922), and *Mabley & Carew Co.* v. *Lee,* 129 O. S. 69 (1934), that by reason of the above constitutional and statutory provisions, an employee could not

recover at common law from an employer for injuries or occupational disease suffered in the course of employment because those provisions supplied an exclusive statutory remedy in lieu of an open liability at common law. Both cases arose on demurrer, and the court held that a cause of action was not alleged even though in both cases, as in the instant case, the plaintiffs had alleged that the defendants were negligent and had violated certain statutes of Ohio, which statutes had no direct bearing on the Workmen's Compensation Act.

In the instant case, petitioner alleged in her amended petition a cause of action substantially identical with those set forth in the *Zajachuck* and *Mabley & Carew Co.* cases. It was no doubt because the law of Ohio was so well settled by those cases that petitioner brought suit in the Federal District Court. But the District Court observed the rule laid down by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, and followed the Ohio law as announced in the *Zajachuck* and *Mabley & Carew Co.* cases.

Subsequently, during the pendency of the appeal in the Circuit Court of Appeals, the Ohio Supreme Court in *Triff* v. *National Bronze & Aluminum Foundry Co.*, 135 O. S. 191, expressly overruled the *Zajachuck* and *Mabley & Carew Co.* cases, although they had been law, as one of the three dissenting members of the court in the *Triff* case pointed out, for more than a quarter of a century. The *Triff* case was not new law in the sense that the Ohio Supreme Court simply declared what it had always regarded as the common law or statutory law of Ohio. The *Triff* case, as the bare majority of four members of the court in that case admitted, represented a decisive change in both common and statutory law of Ohio and swept aside that law as it existed at the time the judgment of the District Court in the instant case was rendered. In order to decide the *Triff* case as they did, it was necessary for the Ohio Supreme

Court expressly to overrule both the *Zajachuck* and *Mabley & Carew Co.* cases and thus to substitute a new Ohio law for an old Ohio law.

The *Triff* case was decided shortly after an election in the State had brought about a change in the personnel of the court, and it was decided by a bare majority of the court of 4 to 3. The three minority dissenting judges were apparently so incensed at the prevailing opinion that each wrote a separate, vehement dissent in which all three agreed that the prevailing opinion would not only wreak havoc in the industrial situation in the State, but also amounted to a breach of faith with respect to the understanding and interpretation of Article II, Section 35 of the Ohio Constitution and the Workmen's Compensation Act by both employers and employees.

2. Section 34 of the Judiciary Act.

The Judiciary Act provides that in trials at common law, the Federal court should follow the State law as rules of decision. Until petitioner reached this Court, she conceded, as we have pointed out above in discussing specifications of error and the statement in the opinion of the Circuit Court of Appeals and in the brief of petitioner in the Circuit Court of Appeals, that the District Court correctly followed the applicable Ohio law under the mandate of *Section 34 of the Judiciary Act,* 28 U. S. C., Sec. 725. This Court has repeatedly held that when this is done, the judgment of the Federal District Court cannot be reversed although the highest tribunal of the State subsequently to the judgment of the District Court changes the State law either on matters of common law or upon questions of statutory or constitutional construction.

Morgan v. *Curtenius,* 20 How. 1;

Concordia Insurance Co. of Milwaukee v. *School District No. 98,* 282 U. S. 545;

Board of Councilmen of City of Frankfort v. *Deposit Bank of Frankfort,* 124 Fed. 18 (C. C. A. 6th);

See additional authorities in opinion of Judge Simons, *110 F. (2d) 310.*

Petitioner claims that these decisions are not applicable because all were decided before the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. We have pointed out above that the *Erie Railroad* case, in merely overruling *Swift* v. *Tyson,* 16 Pet. 1, does not change the rule of the above decisions because those decisions were never within the rule of *Swift* v. *Tyson.* On the contrary, those cases involved the construction of State statutes and decisions on local rules of property by the highest tribunal of the State. In such matters, the Federal courts were, under the Judiciary Act, bound to follow the State law as announced by the highest court of the State. Nevertheless, when the State law was changed after the judgment of the Federal court was rendered, those cases held that the judgment of the Federal court could not be made the football of the vacillating, unstable opinions of State courts in a coordinate judicial system.

As this Court said in *Morgan* v. *Curtenius,* 20 How. at page 8:

> "* * * But, however the latter decision" (that is, the overruling state decision rendered subsequently to the judgment of the federal circuit court) "may have a retroactive effect upon the titles held under the deed in question, it cannot have that effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given."

In the *Concordia Insurance Company* case, 282 U. S. at pages 553 to 554, the Court said:

> "* * * But that inquiry may be put aside since the decision was handed down * * * more than a

> year after the present judgment had been entered by the federal district court, and whatever may be the prospective effect of this last decision it cannot be given a retroactive effect in respect of the judgment of the federal district court so as to 'make that erroneous which was not so when the judgment of that court was given.'"

In *Board of Councilmen of City of Frankfort* v. *Deposit Bank of Frankfort*, 124 F. at 24, the Circuit Court of Appeals for the Sixth Circuit stated the matter precisely and pointed out the utter absurdity of making the judgments of a Federal court dependent upon or subject to the changing views of another court in a coordinate judicial system:

> "* * * We do not think it can be admitted that the final judgments of the courts of one jurisdiction can be thus made dependent upon the changing views of the courts of another. * * * To hold otherwise would leave the judgments and decrees of the courts on very unstable foundations, and dependent, not upon their own rectitude, but upon the vicissitudes of shifting opinions in regard to the governing law. * * *"

It is, therefore, clear on both reason and authority that when a Federal district court, under the mandate of Section 34 of the Judiciary Act and the *Erie Railroad* case, has correctly applied the State law as announced by the State's highest court, whether on matters of common law or questions of statutory construction or local rules of property, the judgment of the Federal court cannot be reversed because of a subsequent change in the State law.

Petitioner claims, however, that the recent case of *Carpenter* v. *Wabash Ry. Co.*, 60 S. Ct. 416, 84 L. Ed. 403 (Jan. 29, 1940), supports her claim and requires the reversal of the judgments of the courts below. This case has been so fully and accurately analyzed and distinguished

by the Circuit Court of Appeals in its opinion that it would be unprofitable for us to add anything to what that court has said. The *Carpenter* case simply has no bearing on the instant case.

Section 34 of the Judiciary Act provides that:

> "the laws of the several states * * * shall be regarded as rules of decision *in trials at common law* in the courts of the United States in cases where they apply." (Italics ours.)

We call the court's attention here to the precise wording of that section of the Judiciary Act because it appears to have escaped attention in the decisions which we have cited above, which nevertheless reached the results which they did and support respondent's position as if the precise wording of the statute had been considered. The statute provides that the laws of the several States shall be rules of decision *in trials at common law*. The Act does not require the Federal courts on appeal to regard the laws of the several States as rules of decision since appeals do not involve trials at common law. It is only the district courts, in exercising jurisdiction under the diversity of citizenship clause of the Constitution and the Judiciary Act, that are required by Section 34 of the Act to regard the laws of the several States as rules of decision. This Court and the Circuit Court of Appeals are not bound by Section 34 of the Judiciary Act. This Court and the Circuit Court of Appeals are merely bound to see that the district courts in trials at common law correctly apply the laws of the several States as rules of decision. Once the Circuit Court of Appeals or this Court, or both, have determined that the District courts have correctly applied the law of the particular State as the rule of decision, the Circuit Court of Appeals and this Court, as reviewing

courts, are no longer concerned with Section 34 of the Judiciary Act.

Since it is conceded that the District Court in the instant case did correctly regard the law of the State of Ohio as the rule of decision in rendering judgment for the respondent, Section 34 of the Judiciary Act ceased to have any propelling force with respect to the appeal in the Circuit Court of Appeals and this petition for certiorari. Once the Federal reviewing courts have determined that the District court has correctly applied the law of the particular State as the rule of decision, they must then proceed with the determination of other questions involved in the appeal quite apart from the question of the applicable State law and Section 34 of the Judiciary Act.

Constitutional Questions.

The constitutional questions raised by petitioner in the numerous specifications of error have been repeatedly disposed of adversely to her in the following cases, and we do not believe it would be profitable to advert further to the utter lack of substance in so-called constitutional questions:

Mozingo v. *The Marion Steam Shovel Co.*, 130 O. S. 591, rehearing denied, 298 U. S. 645, dismissed for want of a substantial Federal question and rehearing denied;

Brammer v. *The Alloy Cast Steel Co.*, 133 O. S. 117 (December 1937), cert. den. 304 U. S. 558;

Noggle v. *The Alloy Cast Steel Co.*, 133 O. S. 118 (December 1937), cert. den. 304 U. S. 558.

Conclusion.

It is, therefore, respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Dated July 19, 1940.